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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. MARVIN RAY MARKLE, JR, Defendant and Appellant.	C078327 (Super. Ct. No. CM039180)

A jury found defendant Marvin Ray Markle, Jr., guilty of first degree murder (Pen. Code, § 187; statutory section references that follow are to the Penal Code unless otherwise stated) and sustained an enhancement for personally using a firearm causing great bodily injury or death (§ 12022.53, subd. (d)). Defendant admitted a strike and a prior serious felony conviction (§§ 667, subds. (a)(1), (d), 1170.12) and the trial court sentenced him to 75 years to life plus five years in state prison.

On appeal, defendant contends trial counsel was ineffective in failing to present evidence of third party culpability that counsel promised to present in the opening statement. He further contends that the jury instructions on the corpus delicti rule relieved the prosecution of its burden of proving the degree of murder beyond a reasonable doubt. We affirm the judgment.

FACTS AND PROCEEDINGS

The Prosecution Case

On October 12, 2001, Shirley Pratt was found dead in a wildlife area off of Vance Avenue in Butte County. Her pants were rolled down to her ankles. Dried fluid consistent with semen was on her chest, but there was no sign of forced sexual intercourse. Tire prints led away from her body.

Pratt was killed by a single close range gunshot between the eyes from a semiautomatic handgun. She had been shot at the scene while lying down. An expended nine-millimeter or .38-caliber bullet and a casing were found by Pratt's head. There were no defensive wounds or signs of a struggle, other than the bunching of her clothes and the twisting of her clothes around her ankles.

Pratt's car was found about two to three miles away, and had been set on fire. It was burned around 3:00 a.m. that morning, and the fire was intentional. A tire track found at the scene matched the tires on Pratt's car. Footprints found at the scene of the car did not match footprints found by Pratt's body.

In 2001, James Harrison lived in Biggs, near Gridley. He had prior felony convictions for burglary and possession of stolen property. He was using methamphetamine and had been in and out of prison at the time, but stopped using methamphetamine when his daughter was born 11 years earlier. Harrison met defendant the night before Pratt's death; they went to someone's house for a drink, and walked to a

bar. After defendant acted strangely and falsely accused him of fathering defendant's child, Harrison left defendant.

Harrison stole a bicycle and soon spotted Pratt in front of the house she shared with her boyfriend Fidel Reyna (aka "Oso"), a methamphetamine dealer. He asked Pratt if Reyna was home because he wanted some methamphetamine. She did not know; Harrison helped her carry her shopping bags inside the house, where he learned that Reyna was not home. Harrison asked Pratt if she had any methamphetamine. Pratt did not, but offered Harrison a pill, which he accepted and flushed down the toilet when he used her bathroom. Defendant appeared moments later and started yelling at Harrison; he was upset with Harrison for leaving him. Harrison ran out the door in order to avoid a confrontation.

Harrison learned of Pratt's death the next day. He spoke to Reyna, and told him he was at Reyna's house with someone the night before Pratt was killed. When Reyna asked him to put the person's name on a piece of paper, Harrison wrote down the initials "MM," for defendant, and gave it to Reyna. Harrison initially refused to identify the initials to authorities, but did so years later.

In 2001, Jennifer Casey lived around the corner from Pratt and Reyna. We note that Jennifer Casey married Harrison in 2005 and changed her last name to Harrison. We refer to her by her maiden name to avoid confusion. Casey and defendant had used methamphetamine, but she had stopped using for 11 years at the time of the trial. On the day Pratt died, defendant came to Casey's house and asked for an eight ball of methamphetamine, which she did not have. Defendant showed her a gun; it was heavy and did not have a cylinder like a revolver's. He put the gun into his jacket and said he was going around the corner, which Casey understood to mean going to Pratt and Reyna's house. Casey never saw defendant again. The next day, she learned Pratt had been murdered. She did not mention the incident with the gun to authorities until January

2005, after she became clean in 2003. She started dating Harrison in 2003 or 2004, but did not know him before 2002.

Defendant's former girlfriend Pamela Lucke lived in Biggs in 2001. After her father died in June 2001, Lucke inherited his firearms, including a handgun. Lucke stored the weapons in the garage rafters. One day, defendant handed her the handgun, telling her he had tried it out. She returned the handgun to storage, and eventually sold it to Manuel Vieira. Vieira later sold the gun, a semiautomatic handgun with no bullets. The man who purchased the gun, Keith Hamilton, testified it was a nine-millimeter semiautomatic, and he was "reasonably sure" the firearm was a Ruger. He sold the firearm to another person, but could not remember that person's identity.

On the day Pratt's body was discovered, October 12, 2001, defendant turned himself in on an outstanding warrant. He was paroled from prison on December 9, 2002.

Hollis Thackeray hired defendant to do three to four weeks of construction work in 2003. He knew defendant for about three years before hiring him. While working on the project, a concerned defendant told Thackeray that he had "killed somebody, a girl." Defendant said he had killed the girl by a river or water and got rid of the evidence by burning a vehicle. As to the reason for the killing, Thackeray related, "Something went wrong, you know, either sex or something had gone wrong, and I don't know exactly what went wrong, but something had gone wrong." According to Thackeray, defendant said, "something to the effect of something went wrong with the sex." Defendant also told Thackeray that after the killing, he walked back to Biggs and stopped at the Pheasant Club bar, where defendant who still had the gun in his jacket, was afraid the owner knew about the murder.

Heather O'Neal's husband's sister, Lorraine, was married to defendant. In January 2010, Lorraine was concerned because defendant was calling her at work and would not stop, so she called her brother, O'Neal's husband. O'Neal's husband then called defendant, using the speaker function on the phone so Heather could listen.

Defendant said he was "going to end it all" and suddenly hung up. Concerned, they contacted the Oroville Police Department. They then called defendant again; this time defendant said, "he had killed a girl in Gridley." When O'Neal's husband told defendant the police were coming, defendant said, "[O]h, I know they are coming, and it's because I killed a girl in Gridley." Heather O'Neal thought defendant said the killing happened two years before, but she was not 100 percent sure.

On January 2, 2010, Oroville Police Officer Matthew Gates was dispatched to defendant's home in response to a report that he was suicidal. Defendant was waiting on the front porch. He said he always felt suicidal but was not going to commit suicide. Defendant was ready to go to jail and referred to a previously written suicide note. Asked about the note, defendant initially told Officer Gates to call his brother-in-law, but then said, "I can't live with this anymore," and told Officer Gates he had killed someone. After defendant admitted taking "a handful of medication," Officer Gates took him into custody for a mental health evaluation. Officer Gates asked defendant if he wanted his cell phone secured in the home. Defendant said he did not see the point as he did not anticipate coming back. When the ambulance arrived, defendant asked Officer Gates if he would be taken to jail after getting medical clearance. As he left, defendant yelled to his neighbors to take care of his dog because he was not coming back.

The Defense

Reyna volunteered two nine-millimeter bullets the day after he was interviewed by the police on October 12, 2001. Reyna said he found them in the bathroom. Police became aware of Harrison because he had provided the "MM" note to Reyna, thus injecting himself into the investigation.

Called as a defense witness, Harrison denied placing the two nine-millimeter bullets in Reyna's home.

DISCUSSION

I

Ineffective Assistance of Counsel

During opening statements, defense counsel said the evidence would show Reyna was a drug dealer who turned over to the police nine-millimeter bullets that matched the bullet that killed Pratt. Counsel told the jury it "won't hear any scintilla of physical evidence that places Marvin Markle at the scene of this crime." Counsel also said, "[y]ou will also hear other names involved in this case. You will hear about the last day of Shirley Pratt's life, where she frequented, and where she went. You will hear about the Fast Trip market, where she is seen about a half hour before she was shot." Counsel remarked, "you will also hear the name of 'David Robinson.' You will also hear Shirley Pratt was with a male at the market, that I described to you previously, the Fast Trip market, about 20 to 30 minutes before she was shot."

Defendant points out that evidence regarding a David Robertson was litigated before trial and that, over the prosecution's objection during opening statements, the trial court ruled defense counsel could present third-party culpability evidence and could preview it in the opening statement. He claims counsel's decision to promise to produce evidence regarding Pratt being seen with Robertson at the market 20 to 30 minutes before her death and the subsequent failure to follow through on the promise violated his right to effective assistance of counsel.

To establish a claim of ineffective assistance of counsel, defendants must prove that (1) trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to defendant, meaning there is "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).) If defendant makes an

insufficient showing on either of these components, his ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

"It is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*Mai, supra*, 57 Cal.4th at p. 1009.) We accord trial counsel's tactical decisions substantial deference and do not second-guess counsel's reasonable tactical decisions. (*People v. Maldonado* (2009) 172 Cal.App.4th 89, 97.)

Potential third party culpability evidence is referenced in the record. According to the prosecution's trial brief, there was a rumor that a Robertson killed Pratt because she had recently won a large sum of money at a local casino. Robertson was stabbed to death in another county shortly after Pratt's murder. Local casinos were contacted, and said Pratt had not won a large sum of money from any of them. Concluding on this point, the prosecution brief asserted that the only witnesses indicating Robertson was involved were those who said they heard this from someone else, rendering the evidence inadmissible hearsay.

The defense filed a supplemental trial brief containing a summary of a defense investigator's June 4, 2014, interview with Rebecca Biggers. Biggers told the investigator she dated Robertson for a while when she lived in Biggs but separated from him and moved to Yuba City shortly before Pratt's murder. She and Robertson used a lot of drugs and alcohol then, and they spent a lot of time around Pratt and her boyfriend Reyna. Biggers "said Robertson was getting weirder and weirder, the more time he spent with Reyna and his Mexican friends." She learned about Pratt's death about one day after the body was found, when Robertson called her and told her that someone had

followed Pratt home and shot her in the head after she won a substantial amount of money. Three months to a year before her death, Pratt told Biggers that she was really scared of the river after being assaulted there at night, and would not visit the river with anyone other than Biggers or Robertson. Biggers said that Robertson was not himself when high or drunk and "he would do just about anything for drugs."

Biggers thought Pratt and Robertson were sleeping together behind her back, but she had no proof. She also thought that Robertson may have killed Pratt. Shortly after Robertson's death, she brought up Pratt's death to a mutual friend, who became very defensive and snapped at her, saying she should have asked Robertson. According to Biggers, Robertson preferred to ejaculate on his partner's stomach during sex. He owned guns, but did not have a nine-millimeter, although a handgun was not difficult to obtain in Biggs.

Biggers did not know defendant but knew Reyna. She told the investigator that "she thought Reyna and his Hispanic friends were up to no good." At the time of Pratt's murder, "Robertson was so strung out on drugs and alcohol, he would have done anything for Reyna and his friends."

Although trial counsel never gave a reason for failing to present third-party culpability evidence regarding Robertson, there are potentially valid reasons for counsel's decision. The evidence would appear to rely strongly or exclusively on expected testimony from Biggers consistent with her statements to the investigator. It is possible that, after the opening statement, counsel learned that Biggers was unavailable, was planning on giving different testimony than what was in the interview, or evidence impeaching her expected testimony was discovered. Since there are possible tactical reasons for counsel's decision, we will not second guess trial counsel based on this record. Defendant may prevail on habeas corpus, but he has failed to carry his burden on appeal. We therefore reject his contention.

II

CALCRIM No. 359

The trial court gave the standard jury instruction on the corpus delicti rule, CALCRIM No. 359, as follows:

"The defendant may not be convicted of any crime based on his out of court statements alone. You may only rely on defendant's out of court statements to convict him if you conclude other evidence shows that the charged crime was committed.

"That other evidence may be slight, and need only be enough to support a reasonable inference that a crime was committed.

"The identity of the person who committed the crime and the degree of the crime may be proved by defendant's statements alone.

"You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

Defendant contends this instruction improperly abrogated the prosecution's burden of proof. According to defendant, the statement, "the degree of the crime may be proved by the defendant's statement[s] alone," lessens the burden of proof. Since defendant's statements said nothing about the degree of the homicide, defendant concludes that the instruction "gave the jurors an impermissible 'shortcut' that abrogated the state's burden of proof beyond a reasonable doubt that the defendant committed first degree murder."

Defendant relies on *Francis v. Franklin* (1985) 471 U.S. 307 [85 L.Ed.2d 344] (*Franklin*), for the point that the reference to degrees of crime in the instruction cannot be cured by the statement that defendant cannot be convicted on the basis of his statement alone. *Franklin*, properly read, does not support reversal.

In *Franklin*, the jury was given contradictory, mandatory, and confusing instructions. Like here, the jury was properly instructed on the prosecution's burden of proof beyond a reasonable doubt. But the jurors were also told that " '[t]he acts of a

person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.' " (*Franklin, supra,* 471 U.S. at p. 311 [85 L.Ed.2d at p. 351].) The test is what a reasonable juror could have understood the charge to mean. (*Id*. at p. 315 [85 L.Ed.2d at p. 354].) "The federal constitutional question is whether a reasonable juror could have understood the two sentences as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." (*Id*. at p. 316 [85 L.Ed.2d at p. 354].)

The majority concluded, "The challenged sentences are cast in the language of command. They instruct the jury that 'acts of a person of sound mind and discretion are *presumed* to be the product of the person's will,' and that a person 'is *presumed* to intend the natural and probable consequences of his acts,' . . . . These words carry precisely the message of the language condemned in *Sandstrom* [*v. Montana* (1979)] 442 U.S. [510,] 515 [61 L.Ed.2d 39, 45] (' "The law presumes that a person intends the ordinary consequences of his voluntary acts" '). The jurors 'were not told that they had a choice, or that they *might* infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory.' [Citation.]" (*Franklin, supra,* 471 U.S. at p. 316 [85 L.Ed.2d at pp. 354-355].)

The permissive language of CALCRIM No. 359 stands in contrast to the mandatory language condemned in *Franklin*. In our case, the jury was told that defendants' statements alone "may" prove the degree of the crime. There is no mandatory presumption at issue. There is no "language of command." Rather, the jury had the option to consider defendant's out-of-court statements and to determine whether they proved the degree "beyond a reasonable doubt." Moreover, the very sentence that follows the targeted language reminds the jurors, "You may not convict the defendant

unless the People have proved his guilt beyond a reasonable doubt." (CALCRIM No. 359.)

We must determine whether there is a reasonable likelihood the jury understood the instruction in a manner that violates defendant's rights. (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) To assess that likelihood, we must consider the instructions as a whole; we cannot isolate any given instruction. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) There is no support in *Franklin* for defendant's argument that there is a reasonable likelihood the jurors viewed the permissive language contained in CALCRIM No. 359 as a diminution of the prosecutor's burden of proof.

The court also instructed the jury with CALCRIM No. 520, which states in pertinent part: "If you decide that the defendant committed murder, it is murder of the second degree unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM number 521." The jury was also properly given the standard instruction on first degree murder, CALCRIM No. 521. The court also gave CALCRIM No. 200, which states in pertinent part: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you've decided what the facts are, follow the instructions that do apply to the facts as you find them."

Viewed in context with the other relevant instructions, there is nothing constitutionally infirm about CALCRIM No. 359. While the jury *may* determine the degree of the crime, it is not required to do so, and the People still have the burden of proving beyond a reasonable doubt that the murder is first degree. The language in CALCRIM No. 359 does not suggest how the jury should find the facts of the case, and may not even apply depending upon what facts it finds. It is a correct statement of the law.

DISPOSITION

The judgment is affirmed.

HULL, Acting P. J.

We concur:

BUTZ, J.

RENNER, J.